NATIONAL WILDLIFE FEDERATION & CITIZENS COAL COUNCIL
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

177 IBLA 315 Decided June 18, 2009

Editor's note: appeal filed, Civ No. 2:06-CV-00011 (N.D.W.Va., date unknown); **summary judgment for appellant** (Sept. 20, 2007); **aff'd** No.07-2189 (4th Cir. June 10, 2009)

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Office of Hearings and Appeals
Interior Board of Land Appeals
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Arlington, VA 22203

NATIONAL WILDLIFE FEDERATION
&
CITIZENS COAL COUNCIL
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 2009-16 Decided June 18, 2009

Appeal from a decision of Administrative Law Judge James H. Heffernan denying a petition for fees and expenses under 30 U.S.C. § 1275(e) (2006) and implementing rules. IBLA 97-89 and IBLA 97-89R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Final Order--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally

A petition for award of attorney fees and expenses under 43 C.F.R. § 4.1294 is properly denied when the petitioners fail to show a causal nexus between their participation in administrative proceedings before the Department and settlement of Federal litigation in a United States District Court.

APPEARANCES: Walton D. Morris, Esq., Charlottesville, Virginia, and Thomas Galloway, Esq., Boulder, Colorado, for Petitioners; Charles P. Gault, Esq., and Courtney W. Shea, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

National Wildlife Federation and Citizens Coal Council (Petitioners) have appealed from the July 29, 2008, decision of Administrative Law Judge James H. Heffernan denying their application for an award of attorney fees and related

expenses under section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (2006), and implementing regulations at 43 C.F.R. §§ 4.1290 through 4.1296. As explained below, we affirm Judge Heffernan's decision.

I. BACKGROUND

On December 11, 1996, Petitioners filed a petition with this Board for an award of $62,782 for attorney fees and $2,622.39 for expenses incurred for legal work on Petitioners' behalf during a citizen enforcement action involving a series of citizen complaints against the Pittston Coal Company (Pittston).[1] The Board docketed the petition as IBLA 87-89, and denied it in *Citizens Coal Council v. Office of Surface Mining Reclamation and Enforcement (CCC v. OSM)*, 145 IBLA 304 (1998). Their petition was based on an appeal docketed by the Board as IBLA 95-338, and decided by the Board in *West Virginia Highlands Conservancy v. OSM (WVHC v. OSM)*, 136 IBLA 65 (1996), *recon. denied*, Order, IBLA 93-338R (Sept. 3, 1996).

At issue in *WVHC v. OSM* was a series of citizen complaints in which Petitioners sought reclamation of abandoned coal mines and payment of delinquent penalties and fees allegedly owed by Pittston under Departmental regulations 30 C.F.R. §§ 773.5 and 773.15. Petitioners alleged that Pittston, in applications for new permits, renewed permits, and permit revisions, had failed to disclose ownership and control links with 13 different contract operators that had mined 13 permit sites in Virginia.[2] Based upon those links, Petitioners complained that Pittston was responsible for correcting surface mining violations at each site and paying associated penalties and fees. OSM's Big Stone Gap Field Office (BSGFO) determined that the citizen complaints could not be investigated while an injunction remained in place in *Pittston Coal Co. v. Lujan (Pittston v. Lujan)*, No. 91-006-A (W.D. Va. 1992),[3]

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[1] Petitioners have since amended their application to request attorney fees of $50,701.25, as well as the previously requested $2,622.39. *See* ALJ Decision at 1.

[2] On Nov. 18, 1993, Petitioners filed 10 citizen complaints requesting OSM to conduct inspections of contract operations allegedly controlled by Pittston, and requesting OSM to take enforcement action because of Pittston's failure to disclose its control of each of the contractor-operators; on Dec. 30, 1993, Petitioners filed citizen complaints regarding 2 additional contract operators allegedly controlled by Pittston; and on Feb. 4, 1994, Petitioners filed their 13th complaint concerning another Pittston contract operation. *See* Exs. 207, 208, and 209; ALJ Decision at 5.

[3] In *Pittston v. Lujan*, the District Court dismissed Pittston's challenge to OSM's permit-blocking authority, but the court's injunction remained in place pending Pittston's appeal of the dismissal to the U.S. Court of Appeals for the Fourth Circuit.

(continued...)

prohibiting OSM from enforcing the applicant/violator system (AVS) rules at 30 C.F.R. Part 773 against Pittston. On appeal to this Board, Petitioners argued that the injunction did not prohibit all enforcement activities against Pittston under the ownership and control rules. They claimed that OSM had authority under the injunction to proceed with enforcement against Pittston so long as Pittston was afforded due process protection.[4] The Board denied all relief sought by Petitioners. It agreed with OSM's interpretation of the scope of the injunction, held that Petitioners had failed to show error in OSM's decisions, and dismissed their appeals. *Id.*

Petitioners then filed with the Board the request for fees and expenses that is again before the Board. In their fee request, docketed as IBLA 97-89 and decided in *CCC v. OSM*, 145 IBLA 304 (1998), they asserted that their appeal in *WVHC v. OSM* was part of a successful effort that led to a reclamation and fee payment settlement agreement that ended the *Pittston v. Lujan* litigation. They contended that "notwithstanding their lack of success on the merits of the appeal upon which their request for fees and expenses rests . . . , the appeal filed with the Board was part of a successful effort that led to an agreed settlement in *Pittston v. Lujan*." 145 IBLA at 305. They argued "that, but for their complaints before the Department, OSM would not have required Pittston to reveal the extent of the contract coal mining operations that were subject to regulation under the AVS rules when settlement of *Pittston v. Lujan* was negotiated." *Id.* at 306.

The Board ruled otherwise in *CCC v. OSM*, 145 IBLA at 307-08, finding no evidence in the record that the Petitioners had influenced the settlement of *Pittston v. Lujan*. The Board denied Petitioners' application for fees and expenses, ruling that they had not met the requirements of section 525(e) of SMCRA and 43 C.F.R. § 4.1294(b), in that they had not achieved "at least some degree of success on the merits," nor had they "made a substantial contribution to a full and fair determination of the issues." The Board rejected their argument that there was a "causal nexus" between the appeal before the Board and the *Pittston v. Lujan* settlement agreement. The Board stated that there must "be a link between the

[3] (...continued)
On Oct. 6, 1995, in *Pittston v. Babbitt*, 66 F.3d 714 (4th Cir. 1995), the Fourth Circuit affirmed the District Court's dismissal. The Fourth Circuit lifted the injunction on Apr. 23, 1996, after the U.S. Supreme Court denied Pittston's petition for a writ of certiorari.

[4] OSM stated that, notwithstanding the injunction prohibiting enforcement of the AVS rules against Pittston, "it has not 'sat idly' while the injunction has been in place, but has been engaged in 'comprehensive settlement negotiations with Pittston over the past three years' (OSM Answer at 5)." *WVHC v. OSM*, 136 IBLA at 69.

administrative appeal that provides a potential for fee payment and the relief obtained by that appeal which supplies the final element needed for an award to be made." 145 IBLA at 307. The Board concluded that Petitioners had not shown a link between Petitioners' citizen enforcement action, resulting in appeals to the Board, and the settlement agreement between OSM and Pittston, stating as follows:

> While Petitioners allege the existence of such a linkage, OSM undermines the factual predicate stated by Petitioners and refutes the existence of any such linkage in this case. Given the facts stated above, there is no discernable connection between the administrative appeal taken by Petitioners involving the 13 Virginia sites and the settlement agreement made in the *Pittston* court case. The contention by Petitioners that, but for their administrative appeal, OSM would not have sought to include more than one contract mining site in the settlement agreement is refuted by OSM, as is the suggestion that the Virginia contract operations were outside the purview of settlement negotiations that were then already in progress or the inference that conversations between counsel for Petitioners and OSM affected the settlement of the *Pittston* case. Petitioners do not dispute that they must show a link between their appeal and the result obtained by OSM in bargaining with Pittston is dispositive of this petition; without some proof that the appeal to this Board had some effect on the settlement of the *Pittston* case, Petitioners' request for fees and expenses cannot be allowed. No such proof appears in the record presently before us.

145 IBLA at 307-08.

Petitioners sought reconsideration of the Board's decision pursuant to 43 C.F.R. § 4.403, asserting that they sent to the Board a request for an evidentiary hearing that was not received or considered by the Board when it rendered its decision in *CCC v. OSM*. They argued that had the Board considered and granted their request for a hearing, they would have presented additional proof of several facts, as summarized by the Board below:

- the petitioners, at their expense, did in fact participate in the settlement negotiations between OSM and Pittston;
- as the result of the petitioners' participation, Pittston and OSM altered their settlement agreement in material respects that benefitted the public interest;
- inclusion of the petitioners in the negotiation process strengthened OSM's position and led to identification of additional mines to be reclaimed;

- the petitioners' appeal in IBLA 95-338 substantially affected the negotiations and was a catalyst to further disclosure by Pittston; and
- the parties, anticipating a reclamation agreement, agreed in principle to execute a joint motion to dismiss the appeal in IBLA 95-338, but counsel for OSM successfully urged petitioners not to pursue further administrative action on the grounds that it might disrupt or impair the negotiations.

Order, IBLA 97-89R (Sept. 14, 2004), at 2. Petitioners contended that the Board's decision, and its resolution of the disputed factual questions, "was based solely upon OSM's unsubstantiated assertions." *Id.* They argued that at a hearing they would have rebutted OSM's assertions through evidence and testimony.

The Board was persuaded, and by order dated September 14, 2004, granted Petitioners' request for reconsideration and further granted their request for a hearing on the basis that

> [i]n their request, supporting declaration, and the accompanying documentation submitted on reconsideration, petitioners assert facts which raise disputes between them and OSM bearing on the causal relationship between their prosecution of the appeal in IBLA 95-338 and the extent of relief provided through the settlement agreement executed by OSM and Pittston. Review of petitioners' presentation and OSM's record does not resolve the facts of this case. While some of petitioners' evidence is documentary in nature, testimony from witnesses is crucial to resolution of this matter.

Id. at 4. The Board placed upon Petitioners "the burden of proof to establish the specific factual issues regarding their involvement in the administrative proceedings that culminated in the settlement agreement between OSM and Pittston." *Id.* at 5.

II. JUDGE HEFFERNAN'S DECISION

Judge Heffernan issued an order on July 7, 2005, stating that the catalyst theory remains a viable theory for awarding fees and expenses under section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2006), and the implementing regulations at 43 C.F.R. §§ 4.1290–4.1296. He noted that the U.S. Supreme Court's ruling in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001), which struck down the catalyst theory in certain types of cases brought under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2006), did not extend to fees sought under section 525(e) of SMCRA. He stated that application of the catalyst theory "does not alleviate Petitioners of their burden

of proving at hearing that they actually qualify for an award of fees and expenses under Section 525(e) of SMCRA and its implementing regulations." Order dated July 7, 2005. Petitioners stipulated that the catalyst theory was "the sole legal ground on which they might prevail." Petitioners' Opening Brief at 23.

Thus, whether there was a "causal nexus" between the Petitioners' citizen complaints and related appeal in *WVHC v. OSM* and the Settlement Agreement between OSM and Pittston in *Pittston v. Lujan* was the central factual question before Judge Heffernan. He framed the key issue as whether the Petitioners proved that there was "any real connection" between their appeal before this Board in *WVHC v. OSM* and the Settlement Agreement in *Pittston v. Lujan*. ALJ Decision at 4. In order to prevail under the catalyst theory, Judge Heffernan stated that the Petitioners bore the burden to prove the following facts:

> (1) that Petitioners participated in the Pittston settlement negotiations, (2) that, as a result of their actions, Petitioners materially altered or influenced the terms of the Pittston Settlement Agreement, and (3) that the then-pending appeal in IBLA 95-338 substantially affected the content and outcome of the Pittston settlement negotiations. I consider the stated factual elements to be conjunctive and not in the alternative. That is, in my opinion, Petitioners had to prove all three of the above-referenced facts in order to prevail under the catalyst theory.

Id.

Judge Heffernan emphasized that Petitioners had not achieved any degree of success on the merits of their appeal in *WVHC v. OSM*: "There is no getting around the consequences of the [Board's ruling]; Petitioners lost in toto their IBLA appeal in IBLA 95-338. They did not prevail over OSM in any way in that IBLA appeal. The outcome of IBLA 95-338 implicated absolutely no change in the legal relationship of the parties." ALJ Decision at 7.

Moreover, Judge Heffernan rejected Petitioners' argument that the pendency of the citizen complaints at issue in *WVHC v. OSM* facilitated, even made possible, the settlement between Pittston and OSM, and therefore qualified them for payment of attorney fees under 43 C.F.R. § 4.1294(b). He observed that in August 1993, the Director of OSM formed "Team Pittston" to evaluate the pending global settlement agreement between OSM and Pittston regarding "all outstanding disputes between those parties with respect to the application and enforcement of OSM's ownership or control regulations to Pittston." ALJ Decision at 7, *citing* Tr. 269, 499-505; Ex. 124. His findings with regard to the work of Team Pittston, and Petitioners' total lack of involvement in the settlement process, are set forth below:

There is no dispute in the administrative record that Petitioners were never a participant in Team Pittston, and they never participated in any of the actual settlement negotiations between OSM and Pittston. OSM's witnesses testified that Petitioners did not participate in or directly affect the Pittston settlement negotiations (Tr., 680), and Mr. [John] Austin[, Office of the Solicitor,] testified that the only role played by Petitioners was their generalized threat of more, hypothetical citizen complaints in the future. Tr., 639. Mr. [J. Danny] Poteet[, Corporate Director of Environmental Affairs, Pittston,] testified that he never worked personally with Mr. [Walton D.] Morris or Mr. [Thomas] Galloway while employed by Pittston. Tr., 446-47. Mr. Poteet did not recall any discussion of citizen complaints by employees of Pittston during the Pittston internal settlement negotiations, and Pittston was only concerned that the Virginia injunction might be lifted. Tr., 447.

Similarly, Mr. [J. Larry] Williams[, Director of Finance and Administration and Chief of Staff to the Director, OSM, and Team Leader of Team Pittston,] did not recall discussions about the effect of the settlement on citizen complaints during the various meetings of team Pittston. Tr., 515. The Petitioners rely upon the term "environmental group" in Exhibit 124 to infer their catalytic role in the Pittston settlement negotiations; however, that term did not exclusively implicate Petitioners and actually had generic reference to any and all environmental groups which had issues with any of the sites covered by the Pittston settlement. Tr., 530. Once again, this demonstrates that the role of the Petitioners was completely tangential to the actual negotiation of the Pittston settlement. In this context, Mr. Williams testified that Petitioners were invited to visit sites; they did not; and, OSM did not derive any new information from the Petitioners. Tr., 533. The information from Petitioners duplicated information already filed by Pittston with the Virginia Regulatory Authority.

Mr. [Earl David] Bandy[, Chief, AVS Office, OSM,] testified that there were many more citizen complaints of various sorts pending than just the ones implicated in the instant docket, and he testified that the pending citizen complaints did not contribute to resolution of the Pittston settlement. Tr., 874. Mr. Galloway and Mr. Morris did not negotiate with Pittston and OSM. Tr., 150, 373. Mr. Galloway does not recall even meeting with OSM regarding the Pittston negotiations. Tr., 150. In fact, it was the pendency of the expiration of the Virginia Injunction which motivated Pittston toward the settlement agreement, not the entirely peripheral citizen complaints filed by the Petitioners. Tr., 447.

> Petitioners erroneously contend that OSM inspected the mines cited in Petitioners' thirteen citizen complaints in order to resolve both those complaints and the IBLA appeal, citing to Tr., 542-43 and 791-93. This is fatuous. Mr. Williams testified that visiting and photographing citizen complaint sites was to resolve citizen complaints and had nothing procedurally to do with the Petitioners' IBLA appeal. Tr., 542-43. Indeed, the administrative record, when read in context, confirms that the Petitioners' citizen complaints and the IBLA appeal were treated by OSM as distinct, parallel administrative tracks that were defended separately.

ALJ Decision at 7-8.

Judge Heffernan was equally as unpersuaded by Petitioners' "attempt . . . to weave in reclamation issues with respect to their claim for compensable legal fees and expenses under the catalyst theory." *Id.* at 8. He stated as follows:

> This effort, in reality, reflects the paucity of their contribution toward the actual Pittston settlement and their related disqualification for any fees. The testimony of Mr. [Ronnie W.] Vicars[, Reclamation Specialist, BSGFO, OSM,] confirms that, as of November and December 1995, reclamation violations existed at no more than two of the thirteen citizen complaint sites, Interstate and Big T. Tr., 1034; Ex. 193. The total cost to rededicate those violations was a grand total of $1,785.00. Ex. 117. To construe such minor reclamation violations as influential or catalytic with respect to the ultimate resolution of the Pittston settlement, which implicated millions of dollars, constitutes pure sophistry on the part of Petitioners. The record is clear that since the initial inception of settlement negotiations between OSM and Pittston, Pittston had agreed that a settlement, if executed, would, in fact, include reclamation of all sites attributed to its contractor-operators. Tr., 596-97; Ex. 200. In my opinion, Petitioners contributed absolutely nothing to the reclamation provisions ultimately agreed upon between OSM and Pittston, which are set out in Exhibit 200. Stated somewhat more generically, the purportedly catalytic efforts of Petitioners with respect to reclamation issues were not material to the reclamation provisions ultimately set out in the Pittston Settlement Agreement.
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> It is relatedly important that Petitioners did not, in fact, sign Exhibit 200, the Pittston Settlement Agreement; nor did they comment on the agreement prior to its execution. Tr., 709. They were not players in that negotiation. Petitioners may have been hovering on the wings; but, they were definitely not catalysts in the negotiation and

> conclusion of Exhibit 200. Petitioners reference the thin reed of Exhibit 124 to exaggerate their minuscule role in the negotiation of the actual Pittston Settlement Agreement. Tr., 521-22. Exhibit 124 is merely a memorandum compiled to comply with the ministerial Debt Collection Act, according to Mr. Williams. Tr., 516-17. The reference in Exhibit 124 to fostering a relationship with the "environmental community" is generic in content and is not restricted to only the Petitioners, but, rather, refers clearly to many environmental organizations. Tr., 533, 559-60. Petitioners' effort to construe Exhibit 124 as exemplary of their catalytic role in the Pittston settlement is without merit.
>
> Petitioners have proffered no probative evidence of either causing or contributing to the Pittston Settlement Agreement. Petitioners reviewed some photographs of reclamation sites; they refrained from filing additional, potential citizen complaints; and, they temporarily refrained from taking additional adjudicatory or judicial action when the Circuit Court dissolved the Virginia Injunction. Tr., 150-54, 267-68, 293. Testimony from Mr. Poteet, Mr. Williams, and Mr. Bandy confirms that there was no causal link between the referenced inaction by Petitioners and the ultimate settlement agreement. Tr., 457-58; 533, 536; 874. Indeed, each of the contractor-operators alleged to be linked to Pittston in all of Petitioners' thirteen citizen complaints had been disclosed by Pittston to the Virginia [regulatory authority], and to OSM prior to the filing dates of each of Petitioners' subject citizen complaints. What catalytic influence by Petitioners derives from the fact that Pittston's disclosures were always ahead of those of the Petitioners? The answer is that there was no catalytic influence by Petitioners, because DLR had the relevant disclosure information before it was ever filed by Petitioners.

ALJ Decision at 8-10.

What is important in reviewing this evidence is that *WVHC v. OSM* involved OSM's determination not to enforce the AVS rules against Pittston, not OSM's failure to inspect any of the 13 sites subject to the Petitioners' citizen complaints. OSM's inspection actions were not at issue in *WVHC v. OSM*. Nonetheless, Petitioners attempted to argue that OSM's eventual response to the citizen complaints in terms of whether there were substantive violations of SMCRA formed the requisite causal nexus between the appeals in *WVHC v. OSM* and the Settlement Agreement. The evidence in this regard, as summarized by Judge Heffernan, overwhelmingly confirms his conclusion that OSM's inspection actions did not serve as the requisite causal nexus:

As Mr. Austin testified, "There was nothing that OSM did or did not do, and nothing that Pittston did or did not do as a result of that Appeal. *It just had no effect.*" Emphasis added; Tr., 731; Ex. 213. I concur. The record reflects that OSM inspected citizen complaint sites without regard to whether they were the subject of an IBLA appeal. Tr., 874; Ex. 193. Despite the contentions of Petitioners that there was a catalytic relationship between IBLA 95-338 and the Pittston Settlement Agreement, it is my determination that the overall record does not support this conclusion, particularly given that IBLA dismissed that docket without affording the Petitioners any relief whatsoever.

. . . .

Petitioners rely upon Exhibit 65, OSM's letter decision regarding Petitioners' request for informal review as a basis for their contention that they derived some form of settlement with OSM. Petitioners also erroneously contend that OSM changed its position with respect to inspection and reclamation of citizen complaint mines based upon actions by Petitioners. In fact, OSM's informal review decision states that Pittston and OSM had previously entered into settlement negotiations and that the sites delineated in the Petitioners' citizen complaints were included for purposes of inspections and reclamation within the list of sites ultimately subsumed by the Pittston Settlement Agreement. In particular, this letter decision from the Acting Assistant Director, Field Operations, OSM, Washington, D.C., stated the following:

> OSM believes that attainment of the goal of reaching a settlement providing for Pittston's reclamation of identified contractor sites and for the payment of outstanding fees and penalties is within reach. . . . I believe this negotiation process constitutes appropriate action to resolve outstanding violations linked to Pittston by ownership and control within the constraints allowed OSM by the *Pittston* injunction and should be allowed to continue without further court involvement, if possible. Accordingly, I am denying your requests for relief at this time. In the event that the negotiations fail to resolve these matters, I will revisit these issues as necessary.

Ex. 65, pp. 22-23.

The negotiations referred to were these ongoing settlement negotiations between OSM and Pittston and not to any negotiations with Petitioners with respect to a settlement of their citizen complaints or of their IBLA appeal. What this says is that OSM and Pittston, negotiating privately, had included the citizen complaint sites under the umbrella of their pending inspection and reclamation provisions of the Pittston Settlement Agreement. Petitioners had nothing to do with this resolution; they were simply the vicarious beneficiaries of the agreements being derived separately by OSM and Pittston. It is my determination that there was never a written nor an unwritten settlement derived between OSM and Petitioner. Tr., 682, 731, 1024. Such an unwritten settlement agreement was purely in the eyes of the Petitioners, and its existence was mythical.

Mr. Morris acknowledged in his testimony that Petitioners' only written document regarding the settlement negotiations between OSM and Pittston is Exhibit 93. Tr., 356. Specifically, Mr. Morris admitted that, "I have found no other document, earlier or later." Tr., 356. The exhibit referenced in Mr. Morris' testimony is a letter from him to Mr. Austin dated October 25, 1995. This letter requires some attention, because if it does not represent what Petitioners contend that it does, then their whole catalyst theory fails.

The letter starts by stating that, "Following our telephone conversation today regarding OSM's settlement negotiations with the Pittston Company, I thought you *might find it useful* to have at hand a written statement of my clients' position." Emphasis added; Ex. 93, p. 1. Very clearly, this proffered input was something that Mr. Austin did not specifically request and that Mr. Morris was merely volunteering to provide. The letter then summarizes four "principal points" advocated by Petitioners' counsel. With respect to point number 3, the letter tellingly states the following:

> The inspection issue leads to the more general question of the Petitioners' role, *if any*, in the settlement process now under way between OSM, Pittston, and various state regulators. *Although the petitioners recognize that they are not essential parties to a comprehensive settlement, the fact remains that, as pointed out above, the Petitioners have filed numerous pending citizen complaints involving Pittston contract operations.*

Emphasis added; Ex. 93, p. 2.

> Thus, as of October 25, 1995, Mr. Morris admitted in writing that Petitioners were not "essential parties" to the pending Pittston settlement, even though they had filed "numerous" citizen complaints. This admits in writing that, as a legal matter, the Petitioners' citizen complaints were procedurally unrelated to the pending Pittston Settlement Agreement.
>
> Further, Mr. Morris went on in his letter to state, " . . . the Petitioners look forward to OSM's decision on *whether and when to include the Petitioners in the settlement process.*" Emphasis added; Ex. 3, p. 3. This never happened; Petitioners were never included in the Pittston settlement process. Mr. Morris' letter of October 25, 1995, merely reflects the Petitioners effort to get a foot in the door with respect to the Pittston settlement negotiations. In my opinion, this letter proves that Petitioners were never a catalyst with respect to the negotiation and resolution of the Pittston Settlement Agreement, because the elements of participation specified in Mr. Morris' letter never happened; and, consequently, Petitioners never materially influenced the content of the Pittston Settlement Agreement.

ALJ Decision at 10-12.

Judge Heffernan was further persuaded that the fact that Petitioners had filed the petition for fees for their work in *WVHC v. OSM* did not influence the settlement agreement between OSM and Pittston. He considered the testimony of Thomas Bovard, Assistant Solicitor, Branch of Surface Mining, who, at the time of the underlying proceedings, during 1995 and 1996, "was a staff attorney in the main Solicitor's Office handling defensive litigation related to attorneys' fees claims under the purview of SMCRA." *Id.* at 13, *citing* Tr. 1099. Bovard testified that a number of fee matters were settled with Morris, using the standard that the Department felt was appropriate. Bovard described the standard in the following terms:

> [T]he standard is that an award of fees is appropriate when the Claimant prevails in whole or in part as a result of an Appeal before IBLA. . . . The [Claimant can prevail in] an actual substantive Order in, in an Appeal, or settlement of a matter as a result of a pending Appeal, or some other action taken by, for instance, OSM as a result of the pendency of an Appeal before the IBLA.

Tr. 1101-02.

In Judge Heffernan's opinion, Bovard's testimony demonstrated that the Petitioners' appeal in *WVHC v. OSM* was not a catalyst in the settlement reached by

OSM and Pittston in the *Pittston v. Lujan* litigation. Bovard testified that during the pendency of Petitioners' appeal before IBLA in *WVHC v. OSM*, Morris approached him about a "bargain basement settlement of all of his outstanding attorneys fees matters." Tr. 1103. Bovard asked Morris to explain the basis for asserting Petitioners' entitlement to an award of fees. Tr. 1104. Morris responded with what is now Exhibit 106. Tr. 1104; Ex. 106. That Exhibit covered three matters, two of which were consolidated and dismissed in *WVHC v. OSM* (IBLA 95-152 and IBLA 95-338). Bovard testified that the proceeding emanating from IBLA 95-152 provided a proper basis for a settlement of attorneys' fees. Tr. 1107, 1113. However, he testified that the matter in IBLA 95-338 did "not meet the standard that we were using for fee awards," in that it did not serve as a catalyst for any change in OSM's or Pittston's positions. Tr. 1114. Judge Heffernan concluded that Petitioners had "provided no testimony and [had] cited no evidence to prove that they and OSM ever negotiated or resolved any issue that was previously on appeal in IBLA 95-338. Neither have Petitioners proved that OSM changed its position or policies, as a result of their IBLA appeal in 95-338." Tr. 1023-24; Exs. 169, 205. He reiterated: "After all, the Board dismissed that appeal, ruling entirely in favor of OSM with respect to the legal and procedural implications of the Virginia Injunction." ALJ Decision at 14.

In applying the specific requirements of 43 C.F.R. § 4.1294(b), Judge Heffernan found that Petitioners had "not shown that they made a 'substantial contribution' to the Pittston Settlement Agreement." *Id.* He found that "[t]hey did not participate in the negotiations that led to that settlement; they did not review or sign the settlement agreement." *Id.* His reasoning is set forth below:

> The Petitioners' role with respect to the Pittston Settlement Agreement was purely tangential; their role was definitely not catalytic, because Pittston filed its disclosures regarding ownership or control with the Virginia State Regulatory Authority before the Petitioners filed their citizen complaints; the Petitioners never participated in nor did they foster any of the settlement negotiations between OSM and Pittston; and, the Petitioners lost their appeal in IBLA 95-338. In my opinion, these facts disqualify Petitioners from a recovery of any legal fees and expenses, even under the aegis of the catalyst theory, because Petitioners made no "substantial contribution" to the negotiation or resolution of the Pittston Settlement Agreement itself. Consequently, the controlling facts of this case prove that, with respect to the resolution of the Pittston Settlement Agreement, the role of Petitioners was purely tangential and not substantial.

Id. at 16.

III. ARGUMENTS OF THE PARTIES

In their Opening Brief before the Board, Petitioners argue that Judge Heffernan's "findings and conclusions . . . are inconsistent with the credible evidence in the record, erroneous as a matter of law, or both." Petitioners' Opening Brief at 2. They claim that he failed to "assess what the contemporaneous documentary evidence reveals about OSM's motives for providing each element of relief that Petitioners obtained, and by ignoring completely an OSM letter to Petitioners that irrefutably establishes the connection between the relief and Petitioners' prosecution of No. 95-338 . . . ." *Id.* They "urge the Board to exercise its *de novo* review authority and to confider fully all of the contemporaneous documentary evidence, and to reverse the ALJ decision and enter the requested fee award." *Id.*

Petitioners assert that they "are eligible for and entitled to the fee award they seek because (1) they obtained at least some relief while No. 95-338 was pending and (2) the relief that Petitioners obtained was causally related to their prosecution of that appeal." *Id.* at 27. They argue that "during the pendency of No. 95-338, OSM conducted special federal inspections [of] eleven of Petitioners' citizen complaint mines, found environmental problems at four of those mines, and eventually caused Pittston to reclaim each of those previously undetected state program violations pursuant to the OSM/Pittston settlement agreement." *Id.* They contend that "OSM afforded Petitioners additional relief by photographing each of the citizen complaint mines that the agency inspected, sending those photographs to Petitioners, and augmenting Pittston's required reclamation in response to Petitioners' comments on the photographs." *Id.* at 28. They state that they obtained the relief they sought through "execution of the OSM/Pittston Settlement Agreement shortly after the Board dismissed No. 95-338." *Id.* at 28-29. The relief they "obtained 'advanced an important statutory goal' of SMCRA and ensured that OSM did 'a proper job in carrying out . . . its duties' under the statute." *Id.* at 29 (quoting *West Virginia Highlands Conservancy v. Norton (WVHC v. Norton*), 343 F.3d 239, 245 (4th Cir. 2003)).

Petitioners argue that since they obtained "relief that advanced important statutory goals under SMCRA while No. 95-338 was pending, Petitioners satisfied the 'eligibility' test of 43 C.F.R. § 4.1294(b)." Petitioners' Opening Brief at 30. They contend that Judge Heffernan placed "repeated emphasis on the outcome of No. 95-335," and in doing so "erroneously diverted his attention from [the] actual controversy at hand." *Id.* at 31.

Petitioners further argue that because of their citizen complaints "Pittston ultimately met its disclosure responsibilities in response to the demands of the Virginia state regulatory authority in light of ten-day notices that OSM sent in response to Petitioners' citizen complaints." *Id.* Contrary to Judge Heffernan's

findings, they assert that they "both participated in and fostered OSM's settlement negotiations with Pittston." *Id.* They argue: "Although it is true that OSM negotiated the great majority of its settlement agreement without Petitioners' involvement, and although it is true that Petitioners did not sit down with OSM and Pittston together to address the issues that Petitioners raised, Petitioners nonetheless made distinct contributions to the agreement in two respects." *Id.* First, they claim that their citizen complaints led to Federal inspections which led OSM and Pittston to amend their settlement agreement to include reclamation provisions covering four of Petitioner's citizen complaint mines. And second, they claim that they "fostered the settlement agreement by electing, at OSM's urging, not to file a motion to dismiss No. 95-338 as moot." *Id.* Their argument is truly amazing in the context of this matter: "[I]f Petitioners had moved to dismiss No. 95-338 as moot and then pressed for action on their citizen complaints, instead of perceiving the greater good promised by the then-proposed OSM/Pittston Settlement Agreement, the agreement likely would have never come about." *Id.* at 32. And then,

> Causal nexus between No. 95-338 and the relief Petitioners obtained independently exists because Petitioners forestalled collapse of the OSM/Pittston settlement negotiations by refraining, at OSM's urging, from moving for dismissal of No. 95-338 as moot after dissolution of the Virginia injunction and then demanding that OSM pursue permit blocks on Pittston.

Id. at 33. They contend that they "refrain[ed] from doing anything that might jeopardize the Settlement Agreement that OSM and Pittston were about to execute." *Id.* at 36. By doing so, they "enabled OSM to complete its settlement negotiations with Pittston." *Id.* Their forbearance "was part of the 'cooperative working relationship' Petitioners had with OSM, Pittston, and the Virginia regulatory authority . . . ." *Id.* at 41. They assert that they "anticipated that they would move to dismiss the appeal as moot once OSM and Pittston executed their settlement agreement," but that "[t]he Board issued its decision first." *Id.* Then they argue: "Circumstances such as these warrant treating Petitioners, for purposes of their fee petition, as if they had obtained dismissal of No. 95-338 as moot when the Fourth Circuit dissolved the Virginia injunction." *Id.*[5]

[5] We offer no opinion as to whether Petitioners' request for attorney fees and expenses would receive favorable treatment had they moved for a voluntary dismissal of IBLA 95-338 as moot. The application of the two-part test found in 43 C.F.R. § 4.1294(b) would then be different, *i.e.*, the dismissal on the basis of mootness would have to qualify as achieving some degree of success on the merits, and give rise to the conclusion that Petitioners had made a substantial contribution to a full and fair determination of the issues. Suffice it to say that the facts of record

(continued...)

In its Response, OSM asserts that the Board should review Judge Heffernan's decision with deference. Noting that in its order granting reconsideration and ordering a hearing, the Board deemed the testimony of witnesses to be "crucial to the resolution of this matter." Order, IBLA 98-89R (Sept. 4, 2004), at 4. OSM states the Petitioners, being unhappy with Judge Heffernan's findings and conclusions, now ask the Board to disregard the evidence and testimony presented at the hearing. OSM disagrees with Petitioners' argument that the Board should "discount the testimony of witnesses and finding of facts made by the administrative law judge." OSM Response at 8. In OSM's view, "Petitioners now want the Board to accept their interpretation of the meaning of the documents [introduced as evidence], an interpretation developed for the purposes of this appeal." *Id.* OSM's conclusion is that "Petitioners have failed to prove any of the positions that they claimed in their Petition for Reconsideration and that there is no connection between their IBLA Appeal and either the consummation of the Pittston settlement agreement or the resolution of any on-the-ground issues raised by the citizen complaints." *Id.* at 9.

IV. ANALYSIS

[1] Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2006), authorizes the award of costs and expenses, including attorneys' fees, to any person "as determined by the Secretary to have been reasonably incurred" by such person for or in connection with his participation in any administrative proceeding under the Act. Section 525(e) further provides that such costs and expenses, including attorneys' fees, may be assessed "against either party" as the Secretary "deems proper." *Id.* The applicable regulation, 43 C.F.R. § 4.1294(a), provides that an award of costs and expenses will only be appropriate where the SMCRA proceeding "results in . . . [a] final order being issued" by an administrative law judge or the Board. And 43 C.F.R. § 4.1294(b) provides:

> Appropriate costs and expenses including attorneys' fees may be awarded . . . [f]rom OSM to any person, other than a permittee or his representative, who initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues . . . .

The Board applied these provisions in *Citizens Coal Council (CCC)*, 168 IBLA 220 (2006), in which Judge Heffernan denied a petition for fees and costs submitted

[5] (...continued)
are inconsistent with what Petitioners would have us assume for purposes of their fee application.

by CCC as an intervenor in *Amcord v. OSM*, DV-94-21 and DV 95-3-P (Oct. 21, 1994). Amcord filed and was granted a motion for voluntary dismissal of its application for review of a Notice of Violation concerning handling of acid-forming combustible materials. During the period when CCC's procedural appeals were pending before the Hearings Division, Amcord, OSM, the Navajo Nation, and the Bureau of Indian Affairs negotiated a global settlement that would include the subject NOV. CCC actually opposed the settlement. Nonetheless, CCC filed a petition for fees and expenses, arguing that it had made a "substantial contribution" to the "successful final order" entered in the case. The Board set forth the governing framework, as established by section 525(e) of SMCRA and 43 C.F.R. § 4.1294, as follows:

> As noted, Departmental regulations require that in order to recover an award from either the permittee or OSM, the petitioner must have initiated or participated in an administrative review proceeding "reviewing enforcement actions" where a "final order" has been issued finding that the permittee violated SMCRA, its implementing regulations, or the permit. 43 CFR 4.1290(a), 4.1294; *see Natural Resources Defense Council, Inc. v. OSM*, 107 IBLA 339, 96 I.D. 83 (1989). The proceeding in this case was initiated by Amcord to challenge the issuance of the NOV. CCC eventually participated in the administrative process as an intervenor. A final order was issued by Judge Heffernan, allowing for enforcement of the NOV by OSM.
>
> In evaluating CCC's petition for fees and costs, we must apply the related standards of whether CCC is *eligible* for an award of fees and costs under section 525(e) of SMCRA, and, if it is eligible, whether it has demonstrated that it is *entitled* to such an award. *West Virginia Highlands Conservancy*, 152 IBLA 66, 74 (2000); *Natural Resources Defense Council, Inc. v. OSM*, 107 IBLA at 363-65, 96 I.D. at 96-97. First, under 43 CFR 4.1294(b), in order to be eligible for an award, the person must show at least "some degree of success on the merits by the claimants." *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983); *see also Utah International, Inc. v. U.S. Dept. of the Interior*, 643 F. Supp. 810, 817 (D. Utah 1986). . . . As noted by Amcord, in defining the phrase "some success on the merits," the *Utah Internationa*l court deferred to the Supreme Court's conclusion that "trivial success on the merits, or purely procedural victories, would not justify an award of fees." (Amcord's Opposition Brief at unnumbered 5, *quoting* 643 F. Supp. at 817.) This Board has ruled similarly. *See, e.g.*, *Donald St. Clair*, 84 IBLA 236, 242 (1985). Thus, in order to be eligible for an award of fees and costs, a petitioner must have achieved some degree of success on the merits of a substantial matter at issue. *Id.*

> Second, in order to be entitled to an award of fees and costs, an eligible petitioner must demonstrate that it "made a substantial contribution to the full and fair determination of the issues." 43 CFR 4.1294(a). The test of whether a party made the requisite contribution is whether there is a "causal nexus" between the petitioner's actions and the relief obtained, the determination of which depends upon the totality of the circumstances. *See*, *e.g.*, *David Ruth*, 164 IBLA 250, 255 (2005); *West Virginia Highlands Conservancy*, 152 IBLA at 74. Further, the petitioner's contribution must be "separate and distinct" from OSM's. 43 CFR 4.1294(a). *See*, *e.g.*, *Jerry Hylton v. OSM (On Reconsideration)*, 145 IBLA 167, 170 (1998); *Jerry Hylton v. OSM*, 141 IBLA 260, 262 (1997).

168 IBLA at 228-30 (footnotes omitted). The Board agreed with Judge Heffernan that CCC failed to meet both standards.

In the present case, Judge Heffernan properly ruled that Petitioners are entitled to an award, if at all, under the catalyst theory. He quoted the following standard from *WVHC v. Norton*, 343 F.3d at 245: "The fee petitioner must thus satisfy two requirements under the regulation: first, what is called the 'eligibility requirement' (achieving at least some degree of success on the merits); and, second, what is called the 'entitlement requirement' (making a substantial contribution to the determination of the issues)." *See* 43 C.F.R. § 4.1294(b). He was emphatic that Petitioners did not meet the first requirement with respect to IBLA 95-338, since "the Board dismissed that appeal, ruling entirely in favor of OSM." ALJ Decision at 14. He was equally emphatic that Petitioners failed to show that they made a "substantial contribution" to the settlement of *Pittston v. Lujan*. We agree with Judge Heffernan that Petitioners failed to pass either requirement of 43 C.F.R. § 4.1294(b), *i.e.*, they failed to achieve "at least some degree of success on the merits," and they failed to make "a substantial contribution to a full and fair determination of the issues."

Given that the Board ruled against Petitioners in *WVHC v. OSM*, we see no validity whatever to the argument that they meet the eligibility requirement of SMCRA and the regulation. The Board dismissed their appeal in *WVHC v. OSM* as without merit. There is no basis in the record for Petitioners' claim that OSM's inspection activity was somehow causally connected to *WVHC v. OSM*, which involved OSM's determination that it could not apply the Department's AVS rules against Pittston. As noted previously, Petitioners did not appeal OSM's decision not to inspect the 13 operations conducted by Pittston's contractors. OSM's inspection activity, which Petitioners argue influenced the settlement negotiations in *Pittston v. Lujan*, was simply not at issue in *WVHC v. OSM*. Their claim that they were catalysts in bringing about the settlement between Pittston and OSM is baseless. As we stated in *CCC v. OSM*, 168 IBLA at 233, "[t]he test for determining whether a party has

made a 'substantial and fair determination of the issues' is whether there is a 'causal nexus' between the petitioner's actions and the relief obtained." *See Ruckelshaus v. Sierra Club*, 463 U.S. at 688; *Kentucky Resources Council, Inc. v. Babbitt (KRC v. Babbitt)*, 997 F. Supp. 814, 820-21 (E.D. Ky. 1998); *LaRosa Fuel Company, Inc. v. OSM*, 159 IBLA 203, 216 (2003).

The flaw in Petitioners' position is that they have failed, as a factual matter, to establish a causal nexus between their administrative proceeding before the Board, which they lost, and the Settlement Agreement between Pittston and OSM in *Pittston v. Lujan*, in which they played no role. The record is simply inconsistent with what they were able to show at the hearing and what they now argue. OSM rightly contends that Petitioners would have us ignore "Supreme Court precedent . . . as well as the regulations promulgated by the Office of Hearings and Appeals." OSM's Response at 9. We must add that they would have us ignore the facts of record as well. Petitioners asserted in their request for reconsideration of the Board's decision in *CCC v. OSM* that if given the opportunity to present the facts at a hearing it could establish the requisite causal nexus. As Judge Heffernan correctly concluded, Petitioners failed to meet that burden. They failed to establish any of the facts essential to a finding in their favor on any of the assertions made in their petition for reconsideration, as quoted *supra*.

Petitioners' predicament necessitates their tortuous formulation of the eligibility and entitlement requirements of 43 C.F.R. § 4.1294(b). They would have us accept a generalized standard that contemplates only some degree of involvement with SMCRA issues, without the need for any tangible success on the merits of the administrative proceeding that gave rise to the fees request. Their articulation and application of the "causal nexus" theory is extremely broad, and leads, no less, to their argument that the negotiations preceding the Settlement Agreement between OSM and Pittston would have collapsed but for their involvement through the citizen complaints at issue in *WVHC v. OSM*. As we have seen, neither the law nor the record supports their claim.

Petitioners proffer the Fourth Circuit's decision in *WVHC v. Norton*, 343 F.3d at 245, as support for their petition. However, the Fourth Circuit clearly ruled in that case that WVHC had "achieved some success because the Board-ordered remand advanced SMCRA's goals by requiring OSM to fulfill its duty to give proper consideration to citizens' complaints." 343 F.3d at 242. Thus, WVHC was eligible for an award of fees. However, the Fourth Circuit vacated the summary judgment entered by the District Court regarding the entitlement requirement, remanding to the Board "the factual issue of whether WVHC made a substantial contribution toward achieving the Board-ordered remand." *Id.*

At issue in *WVHC v. Norton* was the Board's order granting OSM's request for a remand, which OSM admitted was necessary to allow it to compile an adequate record upon which to render a reliable informal review decision. The Fourth Circuit held that "[a]n administrative remand, like the one ordered by the Board here, that advances an important statutory goal is sufficient success on the merits to establish eligibility for an award of fees under *Ruckelshaus* and *Hanson* [*National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988)], even when that goal is simply to make sure that an agency fulfills its statutory duties." 343 F.3d at 247. The Fourth Circuit held that "the remand order amounted to partial success–success that required OSM to do a proper job in carrying out one of its duties under SMCRA." *Id.* WVHC thus met the eligibility requirement of 43 C.F.R. § 4.1294(b).[6]

In applying the framework utilized in *WVHC v. Norton* to Petitioners' current fee request, as Petitioners urge, we are hard pressed to find that, as a legal matter, they achieved some degree of success on the merits of the proceeding in IBLA 95-338. The Fourth Circuit agreed with the District Court that the Board had erred on the legal determination of whether WVHC had achieved some degree of success on the merits through the remand. A disposition that requires OSM to compile an administrative record in evaluating a citizen complaint clearly meets that standard. However, we see no plausible basis upon which to hold that the Board's outright dismissal of Petitioners' appeals in *WVHC v. OSM* translates into a victory so as to meet the legal standard formulated by the Fourth Circuit in *WVHC v. Norton*. Whether they made a substantial contribution to a full and fair determination of the issues is an entirely different question–a factual question. What Petitioners do is confuse the two requirements by arguing that their appeals in *WVHC v. OSM*, which were dismissed, facilitated–even made possible–the settlement between Pittston and OSM. We now conclude that the Board correctly determined in its decision in *WVHC v. OSM*, 136 IBLA at 69, that the Petitioners failed to achieve at least some degree of success on the merits of their appeal. Nor was there was any connection between the administrative proceeding and the *Pittston v. Lujan* settlement. In their petition for reconsideration of *WVHC v. OSM*, Petitioners asserted that at a hearing they could establish such a link. This they failed to accomplish.

[6] The Fourth Circuit stated that under section 525(e) of SMCRA, the substantial contribution requirement, "the second step in the determination of whether a fee award is proper, is committed by statute to the Board's discretion." 343 F.3d at 248. The Court stated that "[t]he regulation explicitly labels the substantial contribution determination as a 'finding,' indicating that it is a factual determination unlike the legal question of success on the merits." *Id.* "The factual question of whether WVHC made a substantial contribution toward achieving the Board-ordered remand is therefore for the Board to answer in the first instance." *Id.*

In addition, Petitioners offer the decision by the U.S. District Court for the Eastern District of Kentucky in *KRC v. Babbitt* as support for their argument. There, the District Court articulated the three statutory prerequisites for an award of fees under section 525(e) of SMCRA: "1) a final order by an appropriate body or judge; and 2) participation in an 'administrative proceeding' which 3) resulted in relief." 997 F. Supp. at 818. KRC had argued that the prerequisite for the award of fees in an administrative proceeding should include informal administrative proceedings before OSM, which precede a formal appeal to the Board." 997 F. Supp. at 818. The District Court rejected that argument, stating: "If the mere filing of a successful citizens complaint were enough to garner an award of fees, there would be no need for the statute to require the issuance of an 'order' which 'results' from the administrative proceeding as a precondition to an award of fees. In short, there would be no need for the first and third statutory prerequisites." *Id.* at 819. The District Court held that the "[l]anguage in § 525(e) which permits the award of fees to 'either party' strongly suggests that the administrative proceeding specified must be formal and adversarial in nature, supporting the interpretation that the proceeding must be one before the Board." *Id.* at 819. It found that the Board had not rejected KRC's petition for fees based upon a failure to participate in an administrative proceeding, the second prerequisite, but "based upon a finding that the plaintiffs' participation in the appeal was not causally related to the relief they obtained." *Id.*

The District Court stated that "the third prerequisite for an award of fees is a showing that the appeal had some bearing on the actions ultimately taken by OSM officials." *Id.* at 820. "In other words," said the Court, "there must be a causal nexus between the plaintiffs' actions in prosecuting the appeal to the Board and the corrective actions taken by OSM." *Id.* The District Court held that the Board's ruling in *KRC v. OSM*, 137 IBLA 345, 348-49 (1997), was clearly erroneous. In response to KRC's request for informal review, OSM had issued a decision granting plaintiffs "substantial substantive relief," but KRC nonetheless filed an appeal with the Board seeking procedural relief regarding inappropriate delays granted by the Lexington Field Office (LFO) to the Kentucky regulatory authority in addressing KRC's 10-day notices. The Court found that KRC "did not obtain substantial relief on the myriad of procedural issues until OSM issued its Second Memorandum[7] . . . several months

[7] During the pendency of KRC's informal review request concerning the Lexington Field Office's (LFO's) delay of Federal inspection and enforcement action in response to KRC's citizen complaints, OSM issued a "First Memorandum" instructing OSM personnel that their investigations in response to a 10-day notice should last no longer than 30 days and extensions of time no more than 15 days. KRC filed an appeal with this Board based on OSM's failure to provide sufficient relief on KRC's procedural complaints. During the pendency of this appeal, OSM issued a "Second Memorandum" "establishing new procedures to ensure the agency's timely and

(continued...)

after the appeal was filed." *Id.* The Court stated that the "[t]he procedural relief outlined in the Second Memorandum is far-reaching in both scope and application. The timing alone of the issuance of the Second Memorandum raises an inference that plaintiffs' appeal was causally related to the relief obtained." *Id.* The Court concluded:

> [B]ased on the timing, type, and scope of relief ultimately obtained in the Second Memorandum, it is clear that plaintiff's appeal did bear a causal relationship to the relief obtained. The totality of circumstances leading up to the appeal, including the many inordinate delays prior to the award of substantive relief, leads to the conclusion that appeal of the unresolved procedural issues was necessary. What should have been a prompt investigation by the LFO of an easily determinable fact (Branham & Baker's ownership interest in Deep River) became a procedural quagmire which ultimately resulted in significant policy changes by the OSM governing its investigation. In light of the fact that the plaintiffs' appeal was necessary and causally related to the relief awarded, they are entitled to fees for both the costs and expenses of their voluntarily dismissed appeal, and the preliminary informal proceedings leading up to that appeal.

Id. at 821.

KRC v. Babbitt makes clear that KRC's appeal to the Board led to OSM's issuance of the First and Second Memoranda, which granted KRC's request for procedural relief. There was clearly a causal nexus. It is equally clear, however, that there is no such nexus between Petitioners' underlying appeal in the present case and the Settlement Agreement that ended the *Pittston v. Lujan* matter. The facts found by Judge Heffernan are without ambiguity. Petitioners simply and utterly failed to establish the facts they asserted would be addressed at a hearing. Petitioners transmute the facts that did emerge from the hearing into a scenario that bears scant resemblance to objective reality.

Petitioners further argue that the Memorandum Opinion and Order of the U.S. District Court for the Northern District of West Virginia in *WVHC v. Kempthorne*, No. 2:06-CV-00011 (N.D.W.Va. Sept. 20, 2007), supports their position. We disagree. The action in *WVHC v. Kempthorne* originated with a series of citizen complaints regarding acid mine drainage from hydrologic discharges from a mining

[7] (...continued)
effective response to citizen's complaints." 997 F. Supp. at 817. KRC voluntarily moved to dismiss the appeal, since the Second Memorandum addressed and granted the relief KRC requested concerning the procedural issues.

operation of LaRosa, Inc. (LaRosa). In response to OSM's 10-day notice, the West Virginia regulatory authority determined that its jurisdiction terminated upon release of LaRosa's performance bond. *See WVHC*, 165 IBLA 395 (2005). OSM rejected West Virginia's determination and conducted an inspection pursuant to section 501(a)(1) of SMCRA, 30 U.S.C. § 1271(a)(1) (2006), but concluded that it would take no enforcement action against LaRosa. *WVHC*, 165 IBLA at 399. Petitioners filed a request for informal review, which OSM denied, and the Conservancy filed an appeal with the Board. In its decision, the Board set aside OSM's informal review decision, questioning whether OSM even had jurisdiction to conduct the inspection, and remanded the matter to OSM to consider whether its oversight jurisdiction had terminated. The Board stated: "Bringing this matter to a proper conclusion . . . requires us to remand this case to OSM to determine whether jurisdiction terminated under 30 CFR 700.11(d)(1)(I) and whether or not a basis for reasserting jurisdiction has been established under 30 CFR 700.11(d)(2)." *Id.* at 406. Specifically, the Board stated that OSM's inspection had been "premature" and that the administrative record was inadequate "to establish that jurisdiction terminated." *Id.*

The Conservancy requested attorney fees pursuant to 43 C.F.R. § 4.1294(b) on the theory that under *WVHC v. Norton*, 343 F.3d at 247, a Board order vacating an adverse OSM decision and remanding the matter to OSM for the correction of perceived errors in handing a citizen complaint establishes the Conservancy's eligibility for a fee award. In an order dated December 30, 2005, the Board denied the Conservancy's petition because the Board's remand was not based upon any legal argument proffered by the Conservancy, and further, the Conservancy was not likely to obtain the relief it sought on remand. The Board found that the Conservancy had not shown "success on the merits," there being no "causal connection" between "a position taken by [the Conservancy] during the course of the proceeding" and "the rationale on the merits articulated by the Board in its decision." Order, IBLA 2005-204, at 2. The Board reasoned that adopting a construction of 43 C.F.R. § 4.1294(b) allowing an award of costs and expenses for mere "participation in a proceeding that results in a decision or order that furthers the purpose of SMCRA" would render the phrase "success on the merits" meaningless. *Id.* at 5-6.

The District Court applied the regulatory two-part test: "First, the petitioner must achieve, in whole or in part, at least some degree of success on the merits; and second, the petitioner must contribute substantially to the determination of the issues." *WVHC v. Kempthorne,* Slip Op. at 11. Stating that it was required to follow the interpretation of 43 C.F.R. § 4.1294(b) of the Fourth Circuit, the District Court provided a detailed review of *WVHC v. Norton*, and concluded that, as a matter of law, "a court may decide whether a Board-ordered remand for the purpose of developing an adequate administrative record constitutes sufficient success on the merits for establishing a petitioner's eligibility for an award of costs and expenses

under SMCRA's fee-shifting provision." *Id.* at 14. As to the entitlement requirement, *i.e.*, whether the petitioner had made a substantial contribution to a full and fair determination of the issues, the District Court stated that under *WVHC v. Norton*, "whether a petitioner's prosecution of a Board appeal has a causal link to the relief obtained is a question of fact for the Board to consider in the first instance." *Id.*

The District Court held that the Board had incorrectly "refused to evaluate the Conservancy's eligibility for and entitlement to a fee award until final resolution of the separate, remanded proceeding," and in doing so had erroneously "assign[ed] the 'substantial contribution' element of the regulations to the 'success on the merits' or 'eligibility' prong rather than to the 'entitlement' prong." *Id.* at 15. The Court stated that under *WVHC v. Norton*,

> the 'success on the merits' requirement is an independent inquiry that does not, as the Board suggests, demand a causal link between the legal positions advanced by the petitioner and the rationale adopted by the Board. Rather the causal nexus must exist between the actions of the party seeking a fee award and the full and fair determination of the issues.

Id. at 16. The Court concluded that, as a legal matter, "the Conservancy has achieved some degree of success on the merits because the Board has remanded the action for further development of the record." *Id.* The Court therefore ruled that "[w]here the Board orders a remand to develop a sufficient record for the proper and full adjudication of a citizen complaint, thereby ensuring that OSM is meeting its statutory duties, the complaining party achieves partial success on the merits." *Id.* at 17. Further, the Court stated, "[t]his remand represents a partial success on the merits for the Conservancy, regardless of whether the Conservancy ultimately prevails in this dispute, and regardless of whether the Conservancy's legal positions formed any basis for the Board's decision to remand." *Id.* The Court ruled that the Conservancy had met the eligibility requirement for an award of attorney fees. As in *WVHC v. Norton*, however, the Court remanded the matter to the Board for a finding in the first instance on the factual question of whether the Conservancy had "made a substantial contribution toward achieving the Board-ordered remand." *Id.* at 18, *quoting WVHC v. Norton*, 343 F.3d at 248.

It is difficult for us to see how the Court's ruling in *WVHC v. Kempthorne* supports Petitioners position in their current petition for attorney fees.[8] In both

[8] The Fourth Circuit Court of Appeals recently affirmed the District Court's decision. *See WVHC v. Kempthorne*, No. 07-2189 (4th Cir. June 10, 2009). We need not evaluate whether the District Court's (or the Fourth Circuit's) analysis in *Kempthorne* (continued...)

Norton and *Kempthorne*, the Board issued a remand order requiring OSM to develop a complete administrative record, thus advancing the purpose of SMCRA's citizen suit provisions by "ensuring that the agency acted responsibly in fulfilling its duties." *WVHC v. Norton*, 343 F.3d at 247. As the District Court stated in *Kempthorne*, "[t]his typ of partial success is all that is required for a citizen complainant to be eligible for a fee award under SMCRA and its implementing regulations." *WVHC v. Kempthorne*, Slip Op. at 12. In the case before us, the Board dismissed Petitioners' appeals from OSM's informal review decisions, ruling: "We find, therefore, that appellants have failed to show error in these decisions wherein OSM refused to enforce 30 CFR 773.5 and 30 CFR 773.15(b)(1), against the Pittston Company, while the injunction issued in *Pittston v. Lujan* remains in effect. . . . [T]hese appeals are dismissed." *WVHC*, 136 IBLA at 69. We see no plausible basis for Petitioners' argument that by this ruling they obtained "some degree of success on the merits" of their appeals. Judge Heffernan's conclusion is exactly right:

> There is no getting around the consequences of the quoted provisions above; Petitioners lost in toto their IBLA appeal in IBLA 95-338. They did not prevail over OSM in any way in that IBLA appeal. The outcome of IBLA 95-338 implicated absolutely no change in the legal relationship of the parties.

ALJ Decision at 7.

There was no remand to OSM for the development of a complete administrative record, or any other action, that could be construed as a partial success on the merits of their appeals. The scenario presented by Petitioners, *i.e.*, that but for losing their appeal before the Board the settlement agreement between Pittston and OSM would not have materialized, bears no semblance to the record. The Board granted Petitioners' request for a hearing based on their argument that they could establish the facts necessary for a finding that there was a causal nexus between their appeal in IBLA 95-338 and the *Pittston v. Lujan* Settlement Agreement. They have shown no such nexus. They are not eligible for an award because they did not achieve any degree of success on the merits of their appeal. They are not entitled to an award, as the Board ruled in *CCC v. OSM*, 145 IBLA at 307-08, because there is

[8] (...continued)
was wrong, as OSM argues, since we are of the mind that no matter which construction of 43 C.F.R. § 4.1294(b) we endorse, the Petitioners have not shown a causal connection between the administrative proceeding in IBLA 95-338 and the Settlement Agreement that ended the *Pittston v. Lujan* litigation. As Judge Heffernan ruled, the record does not show that their matter before the Board influenced those negotiations in any way.

"no proof that the appeal to this Board had some effect on the settlement of the *Pittston* case . . ." *Id.* at 308.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the ALJ decision denying the request for attorney fees and expenses is affirmed.

/s/
James F. Roberts
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge